

COMMISSION OF THE EUROPEAN COMMUNITIES

COM (73) 1210 final

Brussels, 18 July 1973

Proposal for a Regulation (EEC) of the Council
On the control of concentrations between undertakings

(Submitted to the Council by the Commission on 20 July 1973)

Explanatory Memorandum

Preliminary notes

The increasing number of business concentrations in the Common Market makes the working out of more modern and more precise legislation on concentration necessary. The body of laws on competition hitherto available does not suffice to deal adequately with the dangers to the maintenance of effective competition which result from the continually increasing process of concentration. The Community Treaties provide for a systematic control of business concentrations only in the coal and steel sector (Article 66 ECSC Treaty). Concentration proceedings in the other sectors of the economy are subject to Community rules on competition only if they constitute an abuse of a dominant position within the meaning of Article 86 of the EEC Treaty.

The Council of Ministers already pointed out in the Second Programme for medium-term economic policy of 1969¹ that structural adaptation to Common Market conditions of production and sale would be expressed by an acceleration of the process of concentration; in this connection the Council stressed the urgency of defining clearly the policy to be followed in the field of business concentrations.

The Paris Summit Conference of 19 to 21 October 1972 raised the problem of business concentration and stated as follows: "The Heads of State or of Government consider it necessary to seek to establish a single industrial base for the Community as a whole. This involves the formulation of measures to ensure that mergers affecting firms established in the Community are in harmony with the economic and social aims of the Community, and the maintenance of fair competition as much

¹ Ch. II (11) (OJ No L 129, 30 May 1969, p. 23)

within the Common Market as in external markets in conformity with the rules laid down by the treaties."¹ The Heads of State or Government further agreed that "it was desirable to make the widest possible use of all the provisions of the Treaties, including Article 235 of the EEC Treaty."

In its Resolution of 5 December 1972 on measures to be taken against inflation, the Council has

"taken note of the
Commission's intention to submit, independently of the application of Article 86 to certain cases, proposals aimed at setting up more systematic control over concentrations of a certain size"².

In its Resolution, passed on 7 June 1971 on the basis of the Berkhouwer Report, the European Parliament demanded "that for concentrations which exceed a certain share of the market or a certain size there should be prior notification; such concentrations should be regarded as authorized only if the Commission does not raise any objection within a time-limit yet to be fixed"³.

The Commission, in its Communication of 10 May 1973 to the Council on the Programme for an Industrial and Technological Policy, explains that "an obligation to report the more important concentrations, regardless of the form of the concentration, should be instituted, so that the Commission can intervene before the concentration is carried out, should it hold the latter to be incompatible with the maintenance of competition in conformity with the aims of the Common Market"⁴.

¹ Communiqué issued by the Heads of State or of Government of the Countries of the enlarged Community at their meeting in Paris on the 19 and 20 of October 1972, point 7.

² OJ No C 133, 23 December 1972, p. 14.

³ Resolution of the European Parliament of the rules on competition and the position of European undertakings in the Common Market and in the world economy. OJ No C 66, 1 July 1971, p. 19.

⁴ Doc. SEC (73) 1090 final

The Court of Justice, in its Judgment of 21 February 1973 on Case No. 6/72 (Continental Can), also refers to the aims of the Community. It declares in that judgment that the rules on competition of the EEC Treaty - while differing in their detailed development - "aim at the same goal of maintaining effective competition in the Common Market". The pursuance of this aim, which is more closely defined in Article 3 (f), is, as the Court of Justice also stressed, indispensable for the fulfilment of the Community's tasks.

If Article 3 (f) provides for the institution of a system ensuring that competition in the Common Market is not distorted, it most certainly requires, as the Court of Justice also underlined, that competition should not be eliminated.

Article 85, which prohibits agreements restricting competition between several undertakings, and Article 86, which deals with one-sided activity by one or more undertakings, both aim at maintaining effective competition in the Common Market. As Article 85 even prohibits restrictions on competition which merely affect competition, it cannot be supposed that Article 86 of the Treaty allows undertakings to attain, through a concentration, "such a dominant position that any serious competition is practically excluded." (Judgment Continental Can).

Any differing legal treatment of cartels and business concentrations would, following the Court of Justice, "make a breach in Community legislation on competition which could jeopardize the orderly functioning of the Common Market".

Development of concentration in the Common Market

The number of business concentrations in the Common Market is steadily increasing. Between 1962 and 1970 the yearly number of concentrations in the Community of the Six - defined as financial participations of more than 50 % - rose from 173 to 612. In comparison with 1962, the yearly number of concentrations had increased three and a half times by 1970. In comparison with 1962-66, the rate of increase in 1966-70 had almost doubled.

Since 1965 there has also been an increase in the number of concentrations in Great Britain.

The increasing interlocking of capital arrangements has caused the share of the 100 largest industrial undertakings in the total industrial turnovers to rise in the United Kingdom from 26 % in 1953 to 50 % in 1970, and in Germany from 34 % in 1954 to 50 % in 1969. In France, the degree of concentration is less. Industry in Italy is least concentrated.

The question as to how the increasing number of business concentrations has affected the market structures of the various sectors is of special importance for competition policy. In order to ascertain these effects, the Commission set up a study programme in 1970/71 to analyse concentrations. The results of these studies show a clear, in some sectors even an alarming, increase in the degree of concentration.

In some cases the process of concentration has already gone so far that as few as four suppliers are left in the Community. In many other cases there has been a sometimes considerable reduction in undertakings, the number of suppliers being reduced by up to as much as half.

With the reduction in the numbers of suppliers, the four largest undertakings's share of the total turnover, and of the total number of employees increased. This was found to be the case in all the sectors investigated in the Community.

Beside those studies the Commission's data, which was obtained by continual supervision of certain sectors, also reveals a very high degree of concentration in many sectors. In these sectors between 80 % and 90 % of the total European turnover respectively production was already in the hands of the four largest undertakings.

In a further large number of sectors the degree of concentration is not as high. Nevertheless, here also, one can observe an appreciable increase in the rhythm of the concentration process.

Need for control over mergers

This development should not continue uncontrolled. In a large number of sectors the situation is such that a further development of concentration could imperil the maintenance of effective competition. By merging undertakings

could attain a position on the market which would enable them to avoid the pressure of competition. They would no longer be obliged to adapt the price, quantity and quality of their products to trends of demand. The market position of such undertakings allows them to adopt a price policy which is largely independent of economic developments; that reduces the effectiveness of anti-inflation measures and may amplify business cycles. The price trend, no longer controlled by the market, alters the distribution of income to the detriment of the customers, who also have to accept restrictions on their freedom of choice when purchasing. The workers' freedom to choose among several employers is also restricted.

The effects of business concentrations are particularly serious because the concentration brings about

an irreversible alteration of the market structure. If a dominant position is attained, no real competition from the other suppliers is, as a rule, any longer to be expected, unless there are far-reaching changes in market conditions. Further, dominant undertakings are often in a position to prevent new suppliers from entering the market. This is especially the case if they operate simultaneously on several markets and thus have additional scope for their practices, especially in regard to price-fixing.

The moment has come for the European Community to set up a more systematic control of transactions bringing about a concentration. It is for this reason that the Commission proposes a new regulation on this matter, based on Articles 87 and 235, which provides, in its main points, for the following :

- 1°) concentrations which give the power to hinder effective competition are incompatible with the common market. Concentrations of less importance, which are not likely to give such power are excluded from the application of this rule, in so far as they do not exceed certain fixed quantitative criteria ;
- 2°) concentrations which are necessary to realise an essential Community objective can be exempted from the incompatibility with the common market ;
- 3°) concentrations which concern undertakings whose aggregate turnover is not less than one thousand million units of account are subject to prior notification. This notification has a suspensory effect of three months in which the Commission can initiate proceedings ;
- 4°) if the Commission does not initiate proceedings, the concentration is deemed compatible with the common market. If proceedings are initiated, a final decision must be taken at the latest at the end of a period of nine months ;
- 5°) the legal acts which have taken place in connection with a concentration which is declared incompatible with the common market do not become void.

From the essential characteristics of the proposed regulation it will be clear that the draft neither proposes a system which is - like article 66, of the Coal and Steel Treaty, based on prior authorization, nor of general prohibition, but rather one where the incompatibility with the common market must be established case by case after assessment by the Commission of the power of a concentration to hinder effective competition in the common market.

Under Article 1 (1) of the draft regulation concentration between undertakings, whereby they acquire the power to hinder effective competition or enhance such power are incompatible with the Common Market, insofar as they may affect trade between Member States.

In its "Continental Can" judgement cited above, the Court of Justice of the European Communities referred particularly to the concept of preserving effective competition in order to describe the object of the competition rules in the EEC Treaty. The concept of effective competition can thus be taken as a basic criteria for appraising the compatibility with the Common Market.

The second part of paragraph 1 defines the provision given in part one of said paragraph. The concentration may be incompatible with the Common Market by virtue of the size of the share of the market held or of the special availability of technical knowledge, raw materials or capital. The absolute size of the undertakings concerned as well as their links with suppliers, resellers or undertakings of third countries must be considered. Further, the ability of other suppliers to compete and their conduct, the structure of demand and supply, the limits on access to the market, the rate of technical progress, the growth of the relevant sector and of actual or potential international competition and competition from substitute products must all be considered.

In appraising concentration transactions the implications in respect of the industrial development cannot be ignored. A certain re-grouping might, for instance, be the sole solution practicable to restore some degree of competition in a market otherwise completely dominated by an undertaking which shows a marked internal growth-rate.

Concentrations in this context mean transactions which directly or indirectly bring about concentrations involving at least one undertaking situated within the Common Market. This definition covers intra-Community concentrations as well as concentrations in which undertakings of third countries are involved.

It makes it possible to deal with all concentrations which are likely to prevent effective competition within the Common Market, whether of the horizontal, vertical or conglomerate type, and whether or not they involve undertakings in a dominant position.

The proposed regulation only covers concentrations which bring independent undertakings together under the same control. External growth by means of concentration can substantially modify market structures in a short space of time. It frequently takes place independently of the competitive capacity of the undertakings concerned. Internal growth, on the other hand, which does not fall under this regulation is as such not subject to any restriction in any anti-trust legislation.

Article 1 provides that concentrations which fall within its scope are incompatible with the Common Market. To avoid a decision taken under Article 1 (1) from leading national courts in the legal systems of certain Member States to annul an act carried out in connection with the concentration which is the subject of the decision, Article 3 (2) further provides that a decision that a given concentration is compatible does not automatically render null and void any legal instruments relating to the relevant concentration.

Article 1 (2) provides for a general exception to the rules governing incompatibility established by paragraph 1, as regards concentrations which meet two requirements, namely that the aggregate turnover be less than 200 million UA and that the share of the market not exceed 25 % in any one member country. This clause means that the regulation does not extend to concentrations which are not such as to prevent effective competition in the common market or in a part of it.

Article 1 (3) provides for derogation from the rules governing incompatibility as regards concentrations which, although caught by Article 1, are indispensable to the attainment of an objective which is given priority treatment in the common interest of the Community. This derogation makes it possible to take account of certain necessities of industrial, technological, social and regional policy applied at Community level. In the same way can the integration into an important group sometimes become indispensable to secure the rentability of an undertaking situated in an area which is economically underdeveloped or declining, and where employment problems are particularly grave. This derogation does not, however, have the effect of a legal exception. Under Article 3 (3) it must be applied by a decision granting an individual authorization.

Article 2 defines concentrations in terms largely inspired by Decision No. 24/54 of 6 May 1954 laying down in implementation of Article 66 (1) of ECSC Treaty a regulation on what constitutes control of an undertaking (OJ ECSC of 11 May 1954, page 3, 4, 5). This decision, taken by the High Authority after consulting the Council of Ministers, has shown its value over nearly 20 years of practical application, during which more than 200 individual decisions were taken. Concentrations between undertakings are defined in that Article by reference to a concept of control consisting in economic terms of the power which an undertaking has to determine how another undertaking shall operate.

Article 3 holds the Commission responsible for applying Article 1, and grants her, subject to verification by the Court of Justice, exclusive competence. The cooperation with the authorities of the Member States (Article 20) is guaranteed.

Article 3, second paragraph provides that a decision concerning incompatibility with the common market may not automatically render null and void legal instruments adopted in connection with the concentration (see comments on Article 1).

Paragraph 3 provides for deconcentration orders. Such orders oblige the undertakings to whom they are addressed, to re-establish the provisions of effective competition. They are to be issued either by decision taken pursuant to Article 3 (1) or by separate decision which, while based on the first decision, may be taken subsequently where this is necessary under the circumstances of the case. In order to oblige undertakings to carry out such deconcentration measures, the imposition of high periodic penalties should be sufficient (Article 14 (2) of the regulation).

Paragraph 4, following on from Article 1 (3) stipulates that the derogation provided for in the interest of attaining a priority Community objective may be granted only by a decision giving an individual authorization and thus declaring Article 1 (1) to be inapplicable. The obligations and conditions which may be imposed in connection with such a decision should make it possible to achieve certain requirements which are necessitated by the scale or nature of the approved combination.

Paragraph 5 gives the Commission the sole power to apply Article 3 subject to review by the Court of Justice.

Article 4 stipulates that concentrations which reach or exceed a certain figure must be notified in advance. Article 6 (2) (time-limit for commencing proceedings) shows that notification must be made at least 3 months before the concentration is effected.

Article 4 (1) provides that concentrations which involve undertakings whose aggregate turnover for the last financial year preceding concentration, exceeds one thousand million units of account must be notified in advance. The turnover criterion applicable to industrial and commercial undertakings was chosen because it is so simple; the market share is by nature more difficult to determine and thus, although a possible criterion, is less suitable as a ground upon which the obligation to notify could be based.

The turnover to be used is the aggregate turnover of all the undertakings directly or indirectly involved (see Article 5 (1), and is thus not restricted to turnover within the Common Market but extends to turnover outside the Common Market.

Based on this definition of turn-over, about 300 undertakings-including banking and insurance companies falling within Article 5 (2), would have had to notify their concentration operations, when the turn-over of the undertaking taken over exceeded thirty million units of account. This number of enterprises does not however give a complete picture of the theoretical consequences of establishing a compulsory obligation to notify, because this obligation arises, of course, also, where undertakings merge, whose turn-over is less than one thousand million units of account, but who arrive at or exceed the fixed ceiling by merging.

Following article 4 (2), the obligation to notify does not come in when the turn-over of the undertaking taken over is less than thirty million units of account.

Article 4 (3) points out who shall discharge the obligation to notify.

Article 4 (4) provides for prior voluntary notification of concentrations which do not arrive at the ceiling of one thousand million units of account. This arrangement is to give interested undertakings the chance to benefit from the procedural regulations starting from article 6.

Concluding the explanations concerning Article 4, it must be pointed out, that the obligation of prior notification does in no way prejudice the applicability of Article 1 (1). Inversely, a concentration can fall within the scope of application of Article 1 (1), without being subjected to notification.

Article 5 stipulates that the aggregate turnover and market share referred to in the Draft Regulation must take into account not only the activities of the undertakings participating in the concentration but also those of undertakings or associations of undertakings which are directly involved in the transaction in question.

The turnover criterion cannot apply to banks and insurance companies. Article 5 (2) substitutes other criteria in their case. The criterion for banking and financial institutions was based on a comparison between the main industrial undertakings and the principal banks and finance-houses. It was found that the total assets of the banks and finance-houses represent approximately ten times the turnover of the corresponding industrial undertakings. For insurance companies, the total of premiums received has been adopted as criterion.

Article 6 opens the procedural part of the Regulation.

Paragraph 1 concerns all concentrations which are likely to be caught by Article 1 (1) or (3), regardless of whether notification is obligatory. The commencement of proceedings by the Commission, of which notice must be given to the undertakings involved and to the competent authorities of the Member States, is an important facet of the procedure but does not have the force of a decision. It is essential to the due advancement of examination of the affair, and is the starting-point for the 9 month period in which all decisions pursuant to Articles 3 (1) or (4) must be taken (see Article 17 (1) (a)).

Paragraphs 2, 3 and 4 introduce special arrangements for concentrations which must be notified. Where proceedings are necessary they must be commenced within 3 months following notification (paragraph 2). Otherwise at the end of 3 months the concentration as notified is presumed to be compatible with the common market (paragraph 4). Under Article 7 (1), the concentration may also be effected if before the end of the 3 months period the Commission informs those concerned that proceedings are not being commenced.

These provisions enable those concerned to know relatively quickly whether there are any objections to the concentration. If not, and except in cases where the relevant undertakings agree to extension of that period, or where incomplete information (paragraph 2) or incorrect or misleading information (paragraph 3) is provided at the time of notification, those undertakings are reassured as to the validity of the concentration. These important consequences of non-intervention by the Commission within a fixed period were the reasons for providing also for optional prior notification of concentrations of which notification is not obligatory (see Article 4 (4)).

Article 7 (1) provides for preliminary suspension of a concentration. Such suspension is linked to the optional or obligatory prior notification. It is valid for the period during which the Commission may commence the proceeding.

Paragraph 2 furthermore entitles the Commission to oblige the undertakings by decision to suspend concentration while proceedings are pending.

Paragraphs 1 and 2 of Article 8, concerning communication of objections and hearings, incorporate the corresponding paragraphs of Article 19 of Council Regulation No. 17 (OJ No. 13, 21. 2. 62). Paragraph 3 specifies the relevant rules of Regulation No. 99/63/EEC on the hearings provided for in Article 19 (1) and (2) of Council Regulation No. 17 (OJ No. 127, 20.8.63), and declares them applicable.

Article 9 provides that where the Commission has formally commenced proceedings but finds, while examining the affair, that it should not act, it must formally close the proceedings and so inform the relevant undertakings and the competent authorities of the Member States.

Article 10, on requests for information, is the same as the corresponding Article 11 of Regulation No. 17.

Article 11, on investigations by the authorities of the Member States, is the same as the corresponding Article 13 of Regulation No. 17.

Article 12, on the investigating powers of the Commission, takes over, with one exception, the corresponding Article 14 of Regulation No. 17. Article 12 (1) sentence 2 (b) is formulated as follows: to take "or request" copies of or extracts from the books and business records. This addition is necessary with regard to the experiences made during investigations.

Paragraph 1 of Article 13, on fines, takes over the corresponding provision of Article 15 (1) of Regulation No. 17 with, however, a variation as regards the amount of the increased fines.

Paragraph 2 provides for the imposition of fines of from 1.000 to 1 million units of account for breaches of the obligation to give prior notification. These large penalties should make it possible to ensure that the obligation to notify is respected.

Paragraph 3 provides for fines where the obligation to suspend a concentration is not observed or where a decision taken pursuant to Article 3 (1) is not complied with. The fine may be as much as 10 % of the value of the reorganised assets.

Article 14, on periodic penalty payments, takes over in its points (a) and (b), points (c) and (d) of Article 16 (1) of Regulation No. 17. However, the amounts have been increased.

Paragraph 2 provides for periodic penalty payments up to 50.000 units of account per day of delay in order to compel observance of measures provided for by a decision taken pursuant to Article 3 (3).

Article 15, on review by the Court of Justice, is the same as Article 17 of Regulation No. 17.

Article 16, on professional secrecy, takes over Article 20 of Regulation No. 17.

Under Article 17 the period within which decisions must be taken pursuant to Article 3 (1) or (4) at 9 months calculated from the date of commencement of proceedings is stipulated. This time-limit may be extended where those concerned agree and where circumstances so require. Paragraph 1 further provides that the 9 month period is not applicable where on the basis of a formal decision it has been necessary to request further information or to carry out investigations.

Paragraphs 2 and 3 provide for publication of decisions taken pursuant to Article 3, while account is taken of the legitimate interest of undertakings in the protection of business secrets.

Article 18, on the unit of account, is the same as Article 18 of Regulation No. 17.

Article 19, on liaison with the authorities of the Member States, is an adopted version of Article 10 of Regulation No. 17. It should be pointed out, however, that paragraph 2 allows the Member States to request the Commission to commence proceedings under Article 6.

Article 20 is based on the fact that the proposed regulation covers also concentrations falling within the scope of Article 86 of the EEC Treaty. Article 20 therefore declares Regulations No. 17 and No. 1017/68¹ not applicable on concentrations caught by the proposed Regulation.

Article 21 provides that implementing provisions relating to notifications will be adopted separately by the Commission.

Article 22 will fix a date for the entry into force of the Regulation.

¹ Regulation (EEC) No. 1017/68 of the Council applying rules of competition to transport by rail, road and inland waterway.

II

(Preparatory Acts)

COMMISSION

COM (73) 1210 final
18 July 1973Proposal for a Regulation (EEC) of the Council on the control of concentrations
between undertakings*(Submitted to the Council by the Commission on 20 July 1973)*

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community and in particular to Articles 87 and 235 thereof;

Having regard to the proposal from the Commission;

Having regard to the Opinion of the European Parliament;

Having regard to the Opinion of the Economic and Social Committee;

Whereas, for the achievement of the objectives of the Treaty establishing the European Economic Community, Article 3 (f) requires the Community to institute 'a system ensuring that competition in the common market is not distorted';

Whereas analysis of market structures in the Community shows that the concentration process is becoming faster and that the degree of concentration is growing in such manner that the preservation of effective competition in the common market and the objective set out in Article 3 (f) could be jeopardized;

Whereas concentration must therefore be made subject to a systematic control arrangement;

Whereas the Treaty already provides some powers of action of the Community to this end;

Whereas Article 86 applies to concentrations effected by undertakings holding a dominant position in the common market or in a substantial part of it which strengthen such position to such an extent that the resulting degree of dominance would substantially restrict competition;

Whereas the power of action aforesaid extends only to such concentrations, as would result in only undertakings remaining in the market whose conduct depended on the undertaking which had effected the concentration; whereas it does not extend to the prevention of such concentrations;

Whereas additional powers of action must be provided for to make it possible to act against other concentrations which may distort competition in the common market and to establish arrangements for controlling them before they are effected;

Whereas under Article 235 of the Treaty the Community may give itself the powers of action necessary for the attainment of its objectives;

Whereas, to institute a system ensuring that competition in the common market is not distorted, it is necessary, in so far as trade between Member States may be affected, to submit to control arrangements such concentrations which give undertakings the power to prevent effective competition in the common market or in a substantial part of it, or which strengthen such a power;

Whereas the power to prevent effective competition must be appraised by reference, in particular, to the

scope for choice available to suppliers and consumers, the economic and financial power of the undertakings concerned, the structure of the markets affected and supply and demand trends for the relevant goods or services;

Whereas concentrations which, by reason of the small significance of turnover and market share of the undertakings concerned, are not likely to impede the preservation of effective competition in the common market may be excluded from this Regulation;

Whereas it may be found necessary, for the purpose of reconciling objectives to be attained in the common interest of the Community, especially within the frame of common policies, to exempt certain concentrations from incompatibility, under conditions and obligations to be determined case by case;

Whereas the Commission should be entitled to take decisions to prevent or terminate concentrations which are incompatible with the common market, decisions designed to re-establish conditions of effective competition and decisions declaring that a particular concentration may be considered to be compatible with the common market; whereas the Commission should be given exclusive jurisdiction in this matter, subject to review by the Court of Justice;

Whereas, to ensure effective supervision, prior notification of major concentrations and the suspension of concentrations by undertakings should be made obligatory;

Whereas a time limit within which the Commission must commence proceedings in respect of a concentration notified to it and a time-limit within which it must give a final decision on the incompatibility of a concentration with the common market should be laid down;

Whereas undertakings concerned must be accorded the right to be heard by the Commission as soon as proceedings have commenced, and third parties showing a sufficient interest must be given the opportunity of submitting their comments;

Whereas the Commission must have the assistance of the Member States and must also be empowered to require information to be given and to carry out the necessary investigations in order to examine concentrations in the light of provisions of this Regulation;

Whereas compliance with this Regulation must be enforceable by means of fines and periodic penalty payments; whereas it is desirable to confer upon the Court of Justice, pursuant to Article 172, unlimited jurisdiction to that extent;

Whereas this Regulation should extend both to concentrations which constitute abuses of dominant positions and to concentrations which give the undertakings concerned the power to prevent effective competition in the common market; whereas it should therefore be stipulated that Regulations (EEC) Nos 17 and 1017/68 no longer apply to concentrations from the date of entry into force of the present Regulation,

HAS ADOPTED THIS REGULATION:

Basic provisions

Article 1

1. Any transaction which has the direct or indirect effect of bringing about a concentration between undertakings or groups of undertakings, at least one of which is established in the common market, whereby they acquire or enhance the power to hinder effective competition in the common market or in a substantial part thereof, is incompatible with the common market in so far as the concentration may affect trade between Member States.

The power to hinder effective competition shall be appraised by reference in particular to the extent to which suppliers and consumers have a possibility of choice, to the economic and financial power of the undertakings concerned, to the structure of the markets affected, and to supply and demand trends for the relevant goods or services.

2. Paragraph 1 shall not apply where:

- the aggregate turnover of the undertakings participating in the concentration is less than 200 million units of account and
- the goods or services concerned by the concentration do not account in any Member State for more than 25 % of the turnover in identical goods or services or in goods or services which, by reason of their characteristics, their price and

the use for which they are intended, may be regarded as similar by the consumer.

3. Paragraph 1 may, however, be declared inapplicable to concentrations which are indispensable to the attainment of an objective which is given priority treatment in the common interest of the Community.

Article 2

Definition of concentration

1. The concentrations referred to in Article 1 are those whereby a person or an undertaking or a group of persons or undertakings, acquires control of one or several undertakings.

2. Control is constituted by rights or contracts which, either separately or jointly, and having regard to the considerations of fact or law involved, make it possible to determine how an undertaking shall operate, and particularly by:

- (1) Ownership or the right to use all or part of the assets of an undertaking;
- (2) Rights or contracts which confer power to influence the composition, voting or decisions of the organs of an undertaking;
- (3) Rights or contracts which make it possible to manage the business of an undertaking;
- (4) Contracts made with an undertaking concerning the computation or appropriation of its profits;
- (5) Contracts made with an undertaking concerning the whole or an important part of supplies or outlets, where the duration of these contracts or the quantities to which they relate exceed what is usual in commercial contracts dealing with those matters.

3. Control is acquired by persons, undertakings or groups of persons or undertakings who:

- (1) Are holders of the rights or entitled to rights under the contracts concerned;
- (2) While not being holders of such rights or entitled to rights under such contracts, have power to exercise the rights deriving therefrom;
- (3) In a fiduciary capacity own assets of an undertaking or shares in an undertaking, and have power to exercise the rights attaching thereto.

4. Control of an undertaking is not constituted where, upon formation of an undertaking or increase of its capital, banks or financial institutions acquire shares in that undertaking with a view to selling them on the market, provided that they do not exercise voting rights in respect of those shares.

Article 3

Powers of decision of the Commission

1. When the Commission finds that a concentration is caught by Article 1 (1) and that the conditions laid down in Article 1 (3) are not satisfied, it shall issue a decision declaring the concentration to be incompatible with the common market.

2. The decision by which the Commission declares a concentration to be incompatible within the meaning of paragraph 1 shall not automatically render null and void the legal transactions relating to such operation.

3. Where a concentration has already been put into effect, the Commission may require, by decision taken under paragraph 1 of by a separate decision, the undertakings, or assets acquired or concentrated to be separated or the cessation of common control or any other action that may be appropriate in order to restore conditions of effective competition.

4. When the Commission finds that a concentration is caught by Article 1 (1) and that the conditions laid down in Article 1 (3) are satisfied, it shall issue a decision declaring Article 1 (1) to be inapplicable; conditions and obligations may be attached thereto.

5. Subject to review by the Court of Justice, the Commission shall have sole power to take the decisions provided for in this Article.

Article 4

Prior notifications of concentrations

1. Concentrations shall be notified to the Commission before they are put into effect, where the aggregate turnover of the undertakings concerned is not less than one thousand million units of account.

2. Where concentrations proposed by an undertaking or a group of undertakings have already reached or exceeded the amounts referred to in paragraph 1, they shall be exempted from the obligation of prior notification, if the turnover of the undertaking, the

control of which they propose to acquire is less than 30 million units of account.

3. The obligation to notify shall be discharged by the person or undertaking or the group of persons or undertakings which proposes to acquire control within the meaning of Article 2.

4. Concentrations which are not caught by paragraph 1 may nevertheless be notified to the Commission before they are put into effect.

Article 5

Detailed rules for calculating turnover and market shares

1. (a) The aggregate turnover specified in Articles 1 (2) and 4 (1) shall be obtained by adding together the turnover for the last financial year for all goods and services of:
 - (i) the undertakings participating in the concentration;
 - (ii) the undertakings and groups of undertakings which control the undertakings participating in the concentration within the meaning of Article 2;
 - (iii) the undertakings or groups of undertakings controlled within the meaning of Article 2 by the undertakings participating in the concentration.
- (b) The market shares referred to in Article 1 (2) near those held in the last financial year by all the undertakings listed in subparagraph (a) above.

2. In place of turnover as specified in Articles 1 (2) and 4 (1) and in paragraph 1 of this Article, the following shall be used:

- for banking and financial institutions: one tenth of their assets;
- for insurance companies: the value of the premiums received by them.

Article 6

Commencement of proceedings

1. Where the Commission considers that a concentration is likely to become the subject of a decision under Article 1 (1) or (3), it shall commence proceedings and so inform the undertakings in question and the competent authorities in the Member States.
2. As regards concentrations notified to it, the Commission shall commence proceedings within a period

not exceeding 3 months unless the relevant undertakings agree to extend that period. The period of 3 months shall commence on the day following receipt of the notification, or if the information to be supplied with the notification is incomplete, on the day following the receipt of the complete information.

3. The Commission may commence proceedings after the expiry of the 3 months period where the information supplied by the undertakings in the notification is false or misleading.

4. Without prejudice to paragraph 3 a concentration notified to the Commission shall be presumed to be compatible with the common market if the Commission does not commence proceedings before expiration of the period specified in paragraph 2.

Article 7

Suspension of the effecting of the concentration

1. Undertakings shall not put into effect a concentration notified to the Commission before the end of the time limit provided for in Article 6 (2) unless the Commission informs them before the end of the time limit that it is not necessary to commence proceedings.

2. Where the Commission commences proceedings it may by decision require the undertakings to suspend the concentration until it has decided whether the concentration is compatible with the common market or has closed the proceedings.

Article 8

Communications of objections and hearings

1. Before taking decisions as provided for in Articles 3, 7, 13 and 14, the Commission shall give the undertakings concerned the opportunity of being heard on the matters to which the Commission has taken objection. The same opportunity shall be given to associations of undertakings concerned before decisions before being taken as provided for in Articles 13 and 14.

2. If the Commission or the competent authorities of the Member States consider it necessary, the Commission may also hear other natural or legal persons. Applications to be heard on the part of such persons shall, where they show a sufficient interest, be granted.

3. Articles 2, 3, 4, 7, 8, 9, 10 and 11 of Regulation No 99/63/EEC shall be applied.

*Article 9***Closure of proceedings**

If, after having commenced proceedings, the Commission considers that there are no grounds for action against a concentration, it shall close the proceedings and so inform the undertakings concerned and the competent authorities of the Member States.

*Article 10***Requests for information**

1. In carrying out the duties assigned to it by this Regulation, the Commission may obtain all necessary information from the governments and competent authorities of the Member States and from undertakings and associations of undertakings.

2. When sending a request for information to an undertaking or association of undertakings, the Commission shall at the same time forward a copy of the request to the competent authority of the Member State in whose territory the seat of the undertaking or association of undertakings is situated.

3. In its request the Commission shall state the legal basis and the purpose of the request and also the penalties provided for in Article 13 (1) (b) for supplying incorrect information.

4. The owners of the undertakings or their representatives and, in the case of legal persons, companies or firms, or of associations having no legal personality, the persons authorized to represent them by law or by their constitution, shall supply the information requested.

5. Where an undertaking or association of undertakings does not supply the information requested within the time limit fixed by the Commission, or supplies incomplete information, the Commission shall by decision require the information to be supplied. The decision shall specify what information is required, fix an appropriate time limit within which it is to be supplied and mention the penalties provided for in Article 13 (1) (b) and Article 14 (1) (a) and the right to have the decision reviewed by the Court of Justice.

6. The Commission shall at the same time forward a copy of its decision to the competent authority of the Member State in whose territory the seat of the undertaking or association of undertakings is situated.

*Article 11***Investigations by the authorities of the Member States**

1. At the request of the Commission, the competent authorities of the Member States shall undertake the investigations which the Commission considers to be necessary under Article 12 (1), or which it has ordered by decision pursuant to Article 12 (3). The officials of the competent authorities of the Member States responsible for conducting these investigations shall exercise their powers upon production of an authorization in writing issued by the competent authority of the Member State in whose territory the investigation is to be made. Such authorization shall specify the subject matter and purpose of the investigation.

2. If so requested by the Commission or by the competent authority of the Member State in whose territory the investigation is to be made, officials of the Commission may assist the officials of such authority in carrying out their duties.

*Article 12***Investigating powers of the Commission**

1. In carrying out the duties assigned to it by this Regulation, the Commission may undertake all necessary investigations into undertakings and associations of undertakings.

To this end the officials authorized by the Commission are empowered:

- (a) to examine the books and other business records;
- (b) to take or demand copies of or extracts from the books and business records;
- (c) to ask for oral explanations on the spot;
- (d) to enter any premises, land and means of transport of undertakings.

2. The officials of the Commission authorized to carry out these investigations shall exercise their powers upon production of an authorization in writing specifying the subject matter and purpose of the investigation and the penalties provided for in Article 13 (1) (c) in cases where production of the required books or other business records is incomplete. In good time before the investigation, the Commission shall inform the competent authority of the Member State in whose territory the investigation is to be

made of the investigation and of the identity of the authorized officials.

3. Undertakings and associations of undertakings shall submit to investigations ordered by decision of the Commission. The decision shall specify the subject matter and purpose of the investigation, appoint the date on which it is to begin and indicate the penalties provided for in Article 13 (1) (c) and Article 14 (1) (b) and the right to have the decision reviewed by the Court of Justice.

4. The Commission shall take decisions referred to in paragraph 3 after consultation with the competent authority of the Member State in whose territory the investigation is to be made.

5. Officials of the competent authority of the Member State in whose territory the investigation is to be made may, at the request of such authority or of the Commission, assist the officials of the Commission in carrying out their duties.

6. Where an undertaking opposes an investigation ordered pursuant to this Article, the Member State concerned shall afford the necessary assistance to the officials authorized by the Commission to enable them to make their investigation. Member States shall, after consultation with the Commission, take the necessary measures to this end before

Article 13

Fines

1. The Commission may by decision impose on undertakings and associations of undertakings fines of from 1 000 to 50 000 units of account where intentionally or negligently:

- (a) they supply incorrect or misleading information in a notification pursuant to Article 4;
- (b) they supply incorrect information in response to a request made pursuant to Article 10 or fail to supply information within the time limit fixed by a decision taken pursuant to Article 10,
- (c) they produce the required books or other business records in incomplete form during investigations under Article 11 or 12, or refuse to submit to an investigation ordered by decision taken pursuant to Article 12.

2. The Commission may by decision impose on natural or legal persons fines of from 1 000 to

1 000 000 units of account where, either intentionally or negligently, they commit a breach of the obligation to notify under Article 4.

3. The Commission may by decision impose fines not exceeding 10 % of the value of the reorganized assets where undertakings either intentionally or negligently, conclude an unlawful concentration before the end of the time limit provided for in Article 6 (2) or in spite of a decision taken by the Commission under Articles 3 (1) or 7 (2).

Article 14

Periodic penalty payments

1. The Commission may by decision impose on undertakings or associations of undertakings periodic penalty payments up to 25 000 units of account for each day of the delay calculated from the date appointed by the decision, in order to compel them:

- (a) to supply complete and correct information which it has requested by decision taken pursuant to Article 10;
- (b) to submit to an investigation which it has ordered by decision taken pursuant to Article 12.

2. The Commission may by decision impose on such undertakings periodic penalty payments up to 50 000 units of account for each day of the delay, calculated from the day appointed by the decision, in order to compel them to apply the measures resulting from a decision taken pursuant to Article 3 (3).

Article 15

Review by the Court of Justice

The Court of Justice shall have unlimited jurisdiction within the meaning of Article 17 of the Treaty to review decisions whereby the Commission has fixed a fine or periodic penalty payment; it may cancel, reduce or increase the fine or periodic penalty payment imposed.

Article 16

Professional secrecy

1. Information acquired as a result of the application of Articles 10, 11 and 12 shall be used only for the purpose of the relevant request or investigation.

2. The Commission and the competent authorities of the Member States, their officials and other servants shall not disclose information acquired by them as a result of the application of this Regulation and of the kind covered by the obligation of professional secrecy.

3. The provisions of paragraphs 1 and 2 shall not prevent publication of general information or surveys which do not contain information relating to particular undertakings or associations of undertakings.

Article 17

Time limits and publication of decisions

1. (a) Decisions under Article 3 (1) and (4) shall be taken within 9 months following the date of commencement of proceedings, save where there is agreement with the relevant undertakings to extend that period.

(b) The period of 9 months shall not apply where the Commission is obliged to request information by decision taken pursuant to Article 10 or require an investigation by decision taken pursuant to Article 12.

2. The Commission shall publish the decisions which it takes pursuant to Article 3.

3. The publication shall state the names of the parties and the main content of the decision; it shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

Article 18

Unit of account

For the purpose of this Regulation the unit of account shall be that used in drawing up the budget of the Community in accordance with Articles 207 and 209 of the Treaty.

Article 19

Liaison with the authorities of the Member States

1. The Commission shall forthwith transmit to the competent authorities of the Member States a copy of the notifications together with the most important documents lodged with the Commission pursuant to this Regulation.

2. The Commission shall carry out the procedure set out in this Regulation in close and constant cooperation with the competent authorities of the Member States; such authorities shall have the right to express their views upon that procedure, and in particular to request the Commission to commence proceedings under Article 6.

3. The Advisory Committee on Restrictive Practices and Monopolies shall be consulted prior to the taking of any decision under Articles 3, 13 and 14.

4. The Advisory Committee shall consist of officials having responsibility for restrictive practices and monopolies. Each Member State shall appoint an official to represent it; he may be replaced by another official where he is unable to act.

5. Consultation shall take place, at a meeting convened at the invitation of the Commission, not earlier than fourteen days following dispatch of the invitation. A summary of the facts together with the most important documents and a preliminary draft of the decision to be taken, shall be sent with the invitation.

6. The Committee may deliver an opinion even if certain members are absent and unrepresented. The outcome of the consultation shall be annexed to the draft decision. The minutes shall not be published.

Article 20

Exclusive application of this Regulation

Regulations (EEC) No 17 and 1017/68 shall not apply to the concentrations covered by this Regulation.

Article 21

Implementing provisions

The Commission shall have power to adopt implementing provisions concerning the form, content and other details of notifications pursuant to Article 4 of this Regulation.

Article 22

This Regulation shall enter into force

This Regulation shall be binding in its entirety and directly applicable in all Member States.

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Paragraphs 1 and 2 of Article 8, concerning communication of objections and hearings, incorporate the corresponding paragraphs of Article 19 of Council Regulation No. 17 (OJ No. 13, 21. 2. 62). Paragraph 3 specifies the relevant rules of Regulation No. 99/63/EEC on the hearings provided for in Article 19 (1) and (2) of Council Regulation No. 17 (OJ No. 127, 20.8.63), and declares them applicable.

Article 9 provides that where the Commission has formally commenced proceedings but finds, while examining the affair, that it should not act, it must formally close the proceedings and so inform the relevant undertakings and the competent authorities of the Member States.

Article 10, on requests for information, is the same as the corresponding Article 11 of Regulation No. 17.

Article 11, on investigations by the authorities of the Member States, is the same as the corresponding Article 13 of Regulation No. 17.

Article 12, on the investigating powers of the Commission, takes over, with one exception, the corresponding Article 14 of Regulation No. 17. Article 12 (1) sentence 2 (b) is formulated as follows: to take "or request" copies of or extracts from the books and business records. This addition is necessary with regard to the experiences made during investigations.

Paragraph 1 of Article 13, on fines, takes over the corresponding provision of Article 15 (1) of Regulation No. 17 with, however, a variation as regards the amount of the increased fines.

Paragraph 2 provides for the imposition of fines of from 1.000 to 1 million units of account for breaches of the obligation to give prior notification. These large penalties should make it possible to ensure that the obligation to notify is respected.

Paragraph 3 provides for fines where the obligation to suspend a concentration is not observed or where a decision taken pursuant to Article 3 (1) is not complied with. The fine may be as much as 10 % of the value of the reorganised assets.

Article 14, on periodic penalty payments, takes over in its points (a) and (b), points (c) and (d) of Article 16 (1) of Regulation No. 17. However, the amounts have been increased.

Paragraph 2 provides for periodic penalty payments up to 50.000 units of account per day of delay in order to compel observance of measures provided for by a decision taken pursuant to Article 3 (3).

Article 15, on review by the Court of Justice, is the same as Article 17 of Regulation No. 17.

Article 16, on professional secrecy, takes over Article 20 of Regulation No. 17.

Under Article 17 the period within which decisions must be taken pursuant to Article 3 (1) or (4) at 9 months calculated from the date of commencement of proceedings is stipulated. This time-limit may be extended where those concerned agree and where circumstances so require. Paragraph 1 further provides that the 9 month period is not applicable where on the basis of a formal decision it has been necessary to request further information or to carry out investigations.

Paragraphs 2 and 3 provide for publication of decisions taken pursuant to Article 3, while account is taken of the legitimate interest of undertakings in the protection of business secrets.

Article 18, on the unit of account, is the same as Article 18 of Regulation No. 17.

Article 19, on liaison with the authorities of the Member States, is an adopted version of Article 10 of Regulation No. 17. It should be pointed out, however, that paragraph 2 allows the Member States to request the Commission to commence proceedings under Article 6.

Article 20 is based on the fact that the proposed regulation covers also concentrations falling within the scope of Article 86 of the EEC Treaty. Article 20 therefore declares Regulations No. 17 and No. 1017/68¹ not applicable on concentrations caught by the proposed Regulation.

Article 21 provides that implementing provisions relating to notifications will be adopted separately by the Commission.

Article 22 will fix a date for the entry into force of the Regulation.

¹ Regulation (EEC) No. 1017/68 of the Council applying rules of competition to transport by rail, road and inland waterway.